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DATE: April 13, 2002

TO: William F. Caton

FROM: Bruce Anderson

NUMBER OF PAGES: 5

MESSAGE:

Comments of Illinois NATOA regarding the Declaratory Ruling of March 14, 2002, CS
Docket 02-52.

FROM :

FAX NO. :

Oct. 21 2001 09:49PM P2

Illinois NATOA

National Association of Telecommunications Officers and Advisors, Illinois Chapter
1900 Hassell Road, Hoffman Estates, IL 60195
847-781-2607

April 12, 2002

William J. Caton
Acting Secretary
Federal Communications Commission
Washington, DC 20554

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Dear Commissioners of the FCC:

Illinois NATOA (IL NATOA) would like to voice its concerns regarding the Declaratory Ruling issued March 14, 2002 by the Federal Communications Commission (FCC): CS Docket 02-52. IL NATOA is comprised of municipal telecommunications staff of 43 Illinois Municipalities, primarily in the Chicago area, and related consultants.

Policy Goals

The FCC states that its primary policy goal is to "encourage the ubiquitous availability of broadband to all Americans", to "promote competition... and remove barriers to infrastructure investment", "preserve the vibrant and competitive free market that presently exists for the Internet... unfettered by Federal or State regulation". The FCC also states that it seeks to "remove regulatory uncertainty that in itself may discourage investment and innovation", and "create a rational framework for the regulation of competing services that are provided via different technologies and network architectures". These policy statements follow the assertion that cable modem service is available to approximately 73% of U.S. households.

The numbers indicated in your report would seem to demonstrate that cable modem service has not been affected by any barriers to infrastructure investment, either real or imagined, or by any existing regulation. The fact that only 11% of all households subscribe to high-speed data (HSD) services, despite its wide availability, would seem to indicate that either data users have not found a need for this service, or cannot afford it, and not that states or municipalities are impeding it. To the contrary, it is in the interest of municipalities to have HSD, in all its forms, available to its residents as quickly, and safely, as possible. That only 29% of HSD users are DSL would seem to indicate that it is the telephone companies that need incentive to provide greater access to their product, and not cable companies. It is also possible that telephone companies are reluctant to replace their high-priced T-1 lines with DSL service at a fraction of the cost, and may be slowing its deployment to that end.

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Legislative Uncertainty

It seems that the FCC's goals and actions may be in conflict, as defining cable modem service an interstate information service removes it from both Title VI and Title II regulation, which is fairly well defined, and places it under Title I, which seems more indefinite. This may well result in litigation, the effects which will be uncertainty, which will discourage investment and innovation. The classification of cable modem service as an interstate information service seems as though it will maintain the cable industry's monopoly power over cable modem service, which also discourages innovation.

Use of the Rights-of-Way

The FCC notes that cable operators have had to make major system upgrades to provide cable modem service. The FCC further notes that the new Hybrid Fiber-Coaxial (HFC) architecture of these new systems has been converted to a ring, or star type infrastructure from the older tree-and-branch to provide increased reliability and bandwidth needed for advanced service offerings. It is further noted that cable modem service requires special equipment throughout the system. The FCC later goes on to assert that providing cable modem services has no impact on cable providers' use of the rights-of-way, which is in direct conflict with its prior statements. The cable system is able to provide cable modem service because of upgrades done to the system for the purpose of providing this service. It is not something that happened accidentally. Cable providers are employing larger hubs sites, more and larger nodes and additional fibers, power supplies and stand-by power sources to supply their modem service. There is also additional usage of streets as additional truck rolls are required for installation and repair of cable modem service.

Franchise fees are payments made to municipalities by cable providers for use of the rights-of-way, and not a tax (*City of Dallas v. FCC*, 118F.3d 393). The franchise fees are imposed for the privilege of using municipal property (the rights-of-way) for the corporate benefit of providing services to municipal residents for a profit. Regardless of how cable modem service is classified, it is a service provided by a cable provider over its cable system, which is using municipal rights-of-way to reach its subscribers. The amount of right-of-way needed to provide the services offered by the cable companies has increase due to the system upgrades required to provide cable modem, and other services. As cable modem revenues are derived from the operation of the cable system, over which the service is delivered and by which the revenues are derived. It is our opinion that revenues from cable modem service should be included in the calculation of franchise fees. If revenues from cable modems were removed from franchise fees, Hoffman Estates would lose \$87,048 per year, at our current 18% level of penetration (3,224 HSD subscribers). It should be pointed out that the cable industry had not sought to exclude cable modem service from franchise fees until the FCC ruling.

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Local enforcement of customer service standards.

Local franchising authorities must retain their rights to regulate customer service standards for cable modem service. This is the only way to effectively provide customer service oversight of cable modem service. AT&T Broadband, which is the cable provider in Hoffman Estates, has had extremely poor levels of compliance with FCC customer service standards since December of 2000. Many service problems go on for months with subscribers only finding resolution through municipal intervention. Complaints to Hoffman Estates on cable services, including cable modem service, increased almost 295% in 2001, with many complaints about cable modem service. Municipalities are the only entities positioned to assist residents with problems that cable customer service centers are unable to resolve. To undertake this function at a state or national level would be impractical, if not impossible, as evidenced by the backlog of cases resulting from the FCC's attempted rate regulation in the 1990s. We do not believe that the FCC, or any federal agency, is equipped to deal with thousands of cable modem complaints from across the country each day.

Access to Broadband

To encourage the ubiquitous availability of broadband to all Americans, it is necessary to encourage competition. To this end the Telecommunications Act of 1996 has failed. Looking at historical models that have achieved success in this matter, one must look at how competition in long distance service was achieved. Only by making access to the local loop the same for all providers can true competition be achieved. Currently the Regional Bell Operating Companies (RBOCs) operate in the local exchange market, which they control, in competition to Competitive Local Exchange Carriers (CLECs) who are able to purchase services from the RBOC. However, since the profit margins that the RBOCs make from sales to CLECs is less than what they make from a direct sale to the end-user, there is a disincentive for the RBOCs to meet the needs of the CLECs and their customers. This is evidenced by the fact that SBC/Ameritech has been fined, for the 19th consecutive time in the state of Illinois (for a total of \$30.5 million), for failure to provide adequate service to competitors. It would seem that only making transport through the local loop available to all providers at the same rate, and under the same conditions, will true competition be encouraged. This is the same manner in which gas and electric utility competition is proceeding, and would seem to be the most efficient way for telecommunications providers to work. The one-pipe concept remains the same. Local loop transport needs to be separated from telecommunications service providers in order to make fair universal access available to all.

Now this concept should work well in the mature telephone market where there is already universal service availability, but may or may not work in the nascent cable modem arena where there is not currently universal availability of this service. It is not yet known if cable providers can make adequate profit margins to encourage them to upgrade systems where cable modem service is not yet being offered. (AT&T claimed that would not be the case in the Portland open access case, but they were trying to protect their monopoly power.) Multiple ISP trials are starting to progress, with some actual (though minor) multiple ISP offerings beginning to taking place in different parts of the country. Cable modem service and multiple ISP access is still

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being worked out by the cable industry, so Hoffman Estates does not advocate the requirement of open access at this time. However, we do advocate monitoring the progress being made in this regard, with the possibility of requiring open cable modem service in the future. It would seem that multiple ISPs would lead to greater innovation in services, as well as demand for those services with multiple parties marketing them.

Amendment Issues

There does not seem to be a First Amendment issue should cable modem service be required to offer open access, as the cable providers are still able to communicate their ideas to anyone who is interested in listening. To the contrary open access would allow greater availability of free speech to those who utilize cable modem service to access the World Wide Web.

As to Fifth Amendment concerns, those can be addressed by providing for "reasonable compensation" for use of cable modem facilities by outside Internet Service Providers (ISPs). Perhaps what that "reasonable compensation" is will be determined as more ISPs are allowed access to cable modem service. However, it would seem that there would be more innovation by the presence of multiple ISPs in the HSD realm, which would lead to greater demand for the product, and therefore to more profits for all involved. It would seem that click through access to multiple ISPs should be the future for cable modem service. However, the recent @home bankruptcy indicates that the cable provider's definition of "reasonable compensation" is not working for ISPs. It also clearly demonstrates why open access would benefit consumers, who were left without cable modem service after @home's demise.

In closing, I would like to restate that the Village of Hoffman Estates believes that cable modem service should be considered a cable service. If the designation of "interstate information service" is retained, we believe that municipalities should retain customer service regulation. We also believe that municipalities should receive franchise fees for the use of the rights-of-way through which this service is delivered, and which have been impacted by the upgrades to cable plant required to deliver this system. Again, if cable modem service is the most widely used high-speed data service, it is our contention that municipalities and franchise fees have not been a barrier to deployment of this service.

Thank you for your consideration of this matter.

Sincerely,

William D. McLeod

William D. McLeod
Mayor